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In the Supreme Court of the United States

OCTOBER TERM, 1980

GLENN L. SIKORA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether petitioner's Sixth Amendment right to counsel was violated when a paid government informant engaged him in conversation before his arrest and indictment.

2. Whether statements made by petitioner to an FBI agent before his arrest and indictment should have been suppressed as statements made in connection with an offer to plead guilty.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1980. The petition for a writ of certiorari was filed on September 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury-waived trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on 16 counts charging possession with intent to distribute and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to eight concurrent terms of eight years' imprisonment to be followed by six years' special parole.[1] The court of appeals affirmed, one judge dissenting in part (Pet. App. 1a-16a).[2]

The evidence at trial and at the suppression hearing showed that during the spring and summer of 1977, DEA Special Agent Joseph Rassey made six cocaine purchases from Ed Ajoian and David Kondrat; petitioner was their source of supply (Tr. 30-41, J.A. 124-135).[3] Ajoian was arrested in November 1977. Following his arrest, he

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[1] With respect to each of the eight transactions, the possession and distribution counts were deemed to have merged, so that only eight sentences were imposed on the 16 counts.

[2] Chief Judge Edwards and Circuit Judge Lively were in the majority. District Judge Wiseman dissented in part; he would have reversed six of the concurrent sentences.

[3] These purchases formed the basis for counts 1 through 12. "Tr." refers to the trial transcript; "J.A." refers to the joint appendix in the court of appeals; "H. Tr." refers to the suppression hearing transcript.

agreed to cooperate with the government.[4] Pursuant to that agreement, he made controlled purchases of 28 grams of cocaine from petitioner on February 22, 1978, and May 8, 1978.[5] Prior to the second sale, a transmitter was taped to Ajoian's body, and his conversation with petitioner was recorded (Tr. 42-47, J.A. 136-141).

On May 24, 1978, before petitioner had been arrested or indicted for any of the above transactions, Agent Rassey told petitioner that he was the subject of a DEA investigation and suggested that petitioner might be interested in cooperating with the DEA. Agent Rassey did not question petitioner during this conversation; instead he suggested that petitioner discuss the matter with an attorney and then have the attorney contact him. Agent Rassey informed petitioner that the decision whether to indict and to prosecute was the United States Attorney's and not his (I H. Tr. 2-9, J.A. 71-78). Approximately half an hour later, petitioner visited Agent Rassey in his office. Petitioner asked Rassey what he would have to do in order to cooperate, and he requested names of the narcotics sources in whom Rassey was interested. When Rassey stated that he was interested in persons dealing in pound quantities of cocaine, petitioner stated, "I've got two or three people or a group of people who offer me pounds; which one do you want?" Agent Rassey refused to give any names until petitioner agreed to cooperate. Petitioner responded, "I know who you want" (I H. Tr. 10-11, J.A. 79-80).

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[4]Ajoian pleaded guilty to a lesser narcotics charge and was given a probationary sentence (I H. Tr. 39-41, J.A. 108-110).

[5]These purchases formed the basis for counts 13 through 16.

A few days later petitioner contacted Ajoian.[6] He indicated that he was in trouble, and that he wanted to get rid of his scales and other paraphernalia related to his cocaine distribution business. Ajoian agreed, and turned the items over to the government. On June 14 Agent Rassey gave Ajoian $150 to pay petitioner for the items; he also placed an electronic recording device on Ajoian's person. Ajoian then visited petitioner at his house and offered petitioner the money, but petitioner told Ajoian to keep it as repayment of a debt (1 H. Tr. 20-22, 30-35, J.A. 89-91, 99-104). Petitioner stated that he could no longer sell narcotics since he was under investigation. He and Ajoian then reminisced generally concerning their past cocaine transactions (J.A. 39-70).[7]

After consulting with his attorney, petitioner decided not to cooperate with the government. On July 25, 1978, about six weeks after the last of these conversations, he was indicted on narcotics distribution charges.

2. Prior to trial, petitioner moved to suppress the statements he made to Agent Rassey on May 24, 1978, and the scales and paraphernalia that he gave to Ajoian, as well as his conversations with Ajoian in late May and on June 14, 1978. The district court denied the motions. As to the May 24 statements to Agent Rassey, the court held that they were not made during the course of plea negotiations since petitioner had not yet been arrested or indicted, and hence neither Rule 11(e)(6) of the Federal Rules of Criminal Procedure nor Rule 410 of the Federal

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[6]Agent Rassey testified at the suppression hearing that Ajoian had told him in June of 1978 that petitioner had placed the call (1 H. Tr. 20, 27, J.A. 89-96). Ajoian testified that he no longer remembered who called whom (1 H. Tr. 30, J.A. 99).

[7]The joint appendix filed in the court of appeals contains a transcript of this conversation.

Rules of Evidence required their suppression (II H. Tr. 2, 6-8, J.A. 112, 116-118). The court also refused to suppress the scales and evidence relating to petitioner's conversations with Ajoian (J.A. 32-33).

The court of appeals affirmed the rulings of the district court concerning the admissibility of petitioner's statements and the drug paraphernalia (Pet. App. 1a). With respect to petitioner's statements to Ajoian, the court held that since the conversations had taken place prior to arrest and indictment, there had been no interference with petitioner's Sixth Amendment right to counsel, and therefore *Massiah* v. *United States*, 377 U.S. 201 (1964), was inapposite. Furthermore, the conversations did not take place in a custodial setting, and thus *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), did not mandate their suppression (Pet. App. 1a). The court of appeals adopted the district court's reasoning concerning the admissibility of petitioner's statements to Agent Rassey but found, in any event, that "if the comments made by [petitioner] could be construed as plea negotiations, * * * the admission of these comments in this trial could be nothing other than harmless error when considered against the totality of the clearly admissible evidence" (Pet. App. 2a).

Judge Wiseman wrote a separate opinion, concurring in part and dissenting in part (Pet. App. 2a-16a). He concluded that petitioner's statements to Agent Rassey and Ajoian and the physical evidence petitioner gave Ajoian should all have been suppressed. Judge Wiseman nevertheless agreed with the majority that the admission of this evidence at trial was "harmless error beyond a reasonable doubt" in regard "to Counts Thirteen through Sixteen" (Pet. App. 16a); he therefore agreed that the convictions on those counts should be affirmed.

ARGUMENT

1. Petitioner here challenges the admissibility of his statements to Agent Rassey and Ajoian and the admissibility of the narcotics paraphernalia. But even the judge below who agreed with petitioner's position on these issues concluded that the other evidence supporting his convictions on counts 13 through 16 was so substantial that any error in admitting the challenged evidence was harmless as to those counts. Petitioner does not contest this finding. Accordingly, two of his eight concurrent sentences will be unaffected by review on the merits of the two questions presented. Under the concurrent sentence doctrine, then, it is not necessary for this Court to consider petitioner's claims. *Andresen* v. *Maryland*, 427 U.S. 463, 469 n. 4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Benton* v. *Maryland*, 395 U.S. 784, 787-791 (1969); cf. *Pinkus* v. *United States*, 436 U.S. 293, 304-305 (1978).[8]

2. Petitioner first asserts that the government had enough evidence to prosecute him before May 24, 1978. He thus contends that any evidence derived from his subsequent conversations with Ajoian, a paid government informant, should be deemed inadmissible under this Court's holding in *Massiah* v. *United States*, *supra*. But *Massiah* involved the use of an informant to elicit incriminating statements from the defendant in the absence of counsel *after* he had been indicted, in violation

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[8]Since petitioner's challenges to the remaining six convictions are on grounds unrelated to his guilt or innocence, reversal of his convictions on those counts would not affect the Parole Commission's determination of his offense severity rating and accordingly would have no effect on the term he actually serves. See *Dye* v. *United States Parole Commission*, 558 F. 2d 1376 (10th Cir. 1977); Gov't Supp. Br. in *Rubin* v. *United States*, at 6-8 (No. 77-792), cert. granted, judgment vacated and remanded, 439 U.S. 810 (1978).

of his Sixth Amendment right to counsel. See also *United States* v. *Henry*, No. 79-121 (June 16, 1980), slip op. 5-6. Cf. *Brewer* v. *Williams*, 430 U.S. 387 (1977). The Sixth Amendment right to counsel does not attach until adversary judicial proceedings such as "formal charge, preliminary hearing, indictment, information, or arraignment" have been initiated against the accused. *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972); *United States* v. *Henry*, *supra*, slip op. 8; *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966).[9]

Escobedo v. *Illinois*, 378 U.S. 478 (1964), is not to the contrary. In *Escobedo*, the defendant was arrested, incarcerated, and interrogated in the absence of his attorney despite his request to consult with counsel. But as the Court observed in *Kirby* v. *Illinois*, *supra*, 406 U.S. at 689:

> * * * the "prime purpose" of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda* [v. *Arizona*, 384 U.S. 436 (1966)], "to guarantee full effectuation of the privilege against self-incrimination. . . ." *Johnson* v. *New Jersey*, 384 U.S. 719, 729 [1966]. Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts, *Johnson* v. *New Jersey*, *supra*, at 733-734, and

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[9] *United States* v. *Brown*, 551 F. 2d 639 (5th Cir. 1977), on which petitioner relies, is of no assistance to him. Brown was arrested on state charges. While en route to her preliminary hearing, she was intercepted in the court house corridor and interrogated by FBI agents outside the presence of counsel. The panel held the statements inadmissible under *Massiah* v. *United States*, *supra*. But the panel decision depended on the fact that the defendant was already facing state charges relating to the same transaction (551 F. 2d at 644), which was not the case with petitioner. Moreover, as petitioner candidly admits, this decision was reversed on rehearing *en banc*, 569 F. 2d 236 (5th Cir. 1978).

> those facts are not remotely akin to the facts of the case before us.

Nor are they similar to the facts of this case.[10] Petitioner was not in custody when he spoke with Ajoian, and he had not yet been indicted. For these reasons, petitioner's Sixth Amendment claim fails.

3. Petitioner next contends that Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410 require the exclusion at trial of his unsolicited comment to Agent Rassey that several people had offered him pound quantities of cocaine. Rule 11 (e)(6) and Rule 410 both provide that "evidence of * * * statements made in connection with, and relevant to [an offer to plead guilty], is not admissible in any civil or criminal proceeding against the person who made the plea or offer." Petitioner's remark clearly falls outside the unambiguous language of the Rules. Petitioner did not offer to plead guilty; he did not even offer to cooperate. Indeed, petitioner had not yet even been charged with a crime.[11] The primary purpose of Rules 11(e)(6) and 410 is to encourage a satisfactory

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[10]*Clifton* v. *United States*, 341 F. 2d 649 (5th Cir. 1965), is also inapposite. Clifton was interrogated by FBI agents while incarcerated on state charges. He requested counsel during the interview, and the court of appeals held that counsel should have been provided. It is now well settled that a defendant who requests counsel during custodial interrogation may not be further interrogated unless counsel is provided (*Miranda* v. *Arizona*, 384 U.S. 436 (1966)); but that right, which is not derived from the Sixth Amendment but rather was established by the Court to ensure compliance with the Fifth Amendment, does not attach prior to indictment in a noncustodial setting. *Hoffa* v. *United States*, *supra*.

[11]Compare *United States* v. *Ross*, 493 F. 2d 771 (5th Cir. 1974), on which petitioner relies, in which the defendant, after his arrest, offered to accept the blame for the charged offense if his wife, who was also arrested, was set free. The court held that this offer was a part of an unconsummated plea bargain and should not have been admitted against the defendant at trial. The court did not rely on

resolution of outstanding criminal charges through plea bargaining and compromise. See Advisory Committee Note on Rule 410, Fed. R. Evid. It is most unlikely that the drafters of the Rules intended that they should be applied, as petitioner suggests here, to a conversation with a suspect during the course of a criminal investigation. *United States* v. *Levy*, 578 F. 2d 896 (2d Cir. 1978); 2 *Weinstein's Evidence* para. 410[08] (1980); see *United States* v. *Robertson*, 582 F. 2d 1356 (5th Cir. 1978) (en banc) (post-arrest, preindictment conversation was not a plea negotiation).

In any event, there is no need for the Court to interpret the present scope of these Rules. The Court has proposed amendments to Rules 410 and 11(e)(6) that will restrict the suppression of a defendant's statements to those "made in the course of plea discussions with an attorney for the prosecuting authority." See proposed Rule 410(4); cf. proposed Rule 11(e)(6)(D).[12] This amendment will become effective on December 1, 1980, unless vetoed by Congress. Accordingly, an authoritative ruling on the scope of the current version of the Rules would have little precedential effect.

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either Rule 11(e)(6) or Rule 410, but instead stated that it was applying principles enunciated in *Santobello* v. *New York*, 404 U.S. 257 (1971), to the facts of that case. *Ross* is readily distinguishable from the present case, in which there was no arrest, no charge, no offer to accept criminal liability, and no bargain struck between petitioner and the agent.

[12]Petitioner's statements to DEA Agent Rassey, who was not a prosecuting attorney, would clearly have been admissible under the amended Rules.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

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